

Affiliated FM Ins. Co. v Rosenwach Tank Co., LLC

2013 NY Slip Op 30748(U)

April 8, 2013

Supreme Court, New York County

Docket Number: 600869/10

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART 2

Index Number : 600869/2010
AFFILIATED FM INSURANCE
vs
ROSENWACH TANK
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED
APR 12 2013
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
APR 11 2013
THE PETITION SUPPORT OFFICE
NY SUPREME COURT-CIVIL

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/8/13

Ray, J.S.C.
LOUIS B. YORK

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----X
AFFILIATED FM INSURANCE COMPANY, as
subrogee and assignee of KIP STAWSKI
MANAGEMENT CORP. d/b/a KIPP STAWSKI
MANAGEMENT GROUP and 48th AMERICAS LLC
and 48th AMERICAS LLC,

Plaintiffs,

Index No.: 600869/10

-against-

ROSENWACH TANK CO., LLC,

Defendant,

-----X
ROSENWACH TANK CO., LLC,

Third-Party Plaintiff,

Index No.: 590635/10

-against-

K&G ELECTRIC CO., INC. AND GATESOFT
TECHNOLOGY, INC.,

Third-Party Defendants.

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NEW YORK
COUNTY CLERK'S OFFICE

-----X

YORK, J.:

This case involves a subrogation action in which plaintiff Affiliated FM Insurance Company (Affiliated), seeks to recover \$306,910.02, which was paid to its insured for losses from an alleged failure of a water tower's monitoring system, which is located at 1212 Avenue of the Americas, in Manhattan, New York (the premises). Plaintiff, 48th Americas, LLC (48th Americas), is a limited liability company which owns the premises.

Motion sequence numbers 001, 002, 003, and 004 are consolidated for disposition. In motion sequence No. 001, Rosenwach Tank Co., LLC (Rosenwach), moves, pursuant to CPLR

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3212, for an order granting it summary judgment and dismissing the complaint. In motion sequence No. 002, plaintiffs Affiliated, as subrogee and assignee of Kipp Stawski Management Corp. d/b/a Kipp Stawski Management Group (Stawski) and 48th Americas, and 48th Americas, individually, move, pursuant to CPLR 3212, for an order granting them summary judgment. In motion sequence No. 003, third-party defendant K & G Electric Co., Inc. (K & G), moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing the third-party complaint as to it. In motion sequence No. 004, third-party defendant Gatesoft Technology, Inc. (Gatesoft), moves, pursuant to CPLR 3212, granting the same relief as to it.

FACTUAL ALLEGATIONS

Rosenwach is a company which installs, repairs, and maintains rooftop water tanks and associated controls. Rosenwach hired Joe Gentile (Gentile), the president of Gatesoft, to develop the Abacus Control System (ACS), a water tank control system. The ACS consists of a controller which sits in the basement of a building where water pumps are located, while a sensor sits at the bottom of a water tank, measuring the water level in the tank and converting it into an electrical signal. Wiring delivers the electrical signal from the sensor to the controller, so that the ACS knows when to activate the pumps.

On March 9, 2007, electricians from K & G, at the direction of Rosenwach, installed an ACS unit at the premises. Plaintiffs maintain that the ACS was connected to RH wire, a type of wiring with fabric-based insulation, which was originally installed at the premises in 1964. Plaintiffs contend that the ACS was designed to operate with MTW or THHN wires, which are more resistant to shorts that are caused by heat, age, and moisture.

On April 19, 2007, the ACS at the premises failed, allowing the pumps to continuously

operate and pump water into the tank. This failure caused water in the tank to overflow and flood the roof, stairways, elevator shafts, and commons spaces. Plaintiffs maintain that electricians from Rosenwach determined that the tank overflowed due to a short in the riser wire, and that the problem was repaired using THHN wire.

Plaintiffs maintain that Rosenwach was aware that the ACS unit at the premises had experienced other problems before the incident at issue. Specifically, on April 17, 2007, two days before the flood, Rosenwach dispatched two electricians to the building after it was alerted that pumps at the building failed to operate. The electricians indicated that the problem was fixed, however, Stawski, the building management company, allegedly received subsequent complaints from tenants that the top floors of the premises did not have water.

As a result of the damages allegedly sustained from the flooding, on April 6, 2010, plaintiffs filed a summons and complaint, alleging causes of action against defendant Rosenwach for breach of contract, negligence, and *res ipsa loquitur*. On July 20, 2011, Rosenwach filed a third-party summons and complaint, naming Gatesoft and K & G as third-party defendants.

MOTIONS

In motion sequence No. 001, Rosenwach argues that summary judgment must be granted in its favor because there is no evidence that it breached a duty or was the proximate cause of plaintiffs' damages. Rosenwach contends that because plaintiffs have failed to meet their burden, and do not demonstrate that Rosenwach was responsible for the flood or the short, its motion for summary judgment must be granted.

In motion sequence No. 002, plaintiffs maintain that their motion for summary judgment must be granted because Rosenwach is liable for foreseeable damages to the premises caused by

the negligent installation and maintenance of the ACS. Plaintiffs contend that Rosenwach breached its duty of care by using the wrong type of wiring, and by failing to properly fix the problems with the ACS. Plaintiffs argue that, in the alternative, the doctrine of res ipsa loquitor would apply because the tank would not overflow absent negligence, that the ACS was within the exclusive control of Rosenwach, and that the management of the premises did not interfere with the operation of the ACS.

In motion sequence No. 003, K & G moves for summary judgment, and contends that plaintiffs have failed to produce any evidence to suggest that the cause of the flood was due to K & G's alleged negligent installation of the ACS. K & G argues that plaintiffs' allegations that the ACS failed because of bad wiring is unsupported by the evidence, that Gatesoft designed the ACS to work with wiring commonly utilized in buildings, and that 48th Americas is responsible for the repair and maintenance of the wires.

In motion sequence No. 004, Gatesoft moves for summary judgment, and contends that defendants have failed to demonstrate that Gatesoft was negligent or that there was any failure of the ACS. Gatesoft argues that it was not involved with the installation of the ACS at the premises, and that plaintiffs submit a report from an expert which states that the ACS failed due to a short in the wiring of the building.

DISCUSSION

First, the court will address plaintiffs' argument that Gatesoft and K & G filed their motions for summary judgement in an untimely manner. Part 2's deadline for dispositive motions ~~which~~ requires that motions for summary judgment must be filed within 60 days from the filing of the note of issue. Plaintiffs maintain that Gatesoft violated this part's rules because

the note of issue was filed on June 7, 2012, and Gatesoft's motion was not filed until August 21, 2012, which was past the 60-day deadline.

Plaintiffs contend that K & G's motion for summary judgment was also served in an untimely manner. Plaintiffs argue that their counsel served K & G's counsel with a notice alerting K & G of its new office address. However, plaintiffs contend that it received K & G's motion for summary judgment after the 60-day deadline, because it was allegedly misdirected to the former address. K & G submits affidavits of service which state that the motion was served on the various counsel in this action on August 6, 2012. However, pursuant to the records of this court, the motion was not filed with the court until August 13, 2012, which also exceeds the deadline.

The Court of Appeals has held that when filing a motion for summary judgment after the dispositive motion deadline has passed, there is a requirement that the party serving the late papers provide "a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, nonprejudicial filings, however tardy." *See Brill v City of New York*, 2 NY3d 648, 652 (2004). Here, neither Gatesoft nor K & G demonstrate the required good cause as to why there was a delay in filing of their motions with the court. Therefore, the motions of these parties must be denied. Therefore, Gatesoft and K&G's motions are denied.

Now, on to the remaining two motions. The Court of Appeals has held that summary judgment is a drastic remedy which is granted only when the party seeking summary judgment has established that there are no triable issues of fact. *Andre v Pomeroy*, 35 NY2d 361, 364 (1974). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan*

Museum of Art, 27 AD3d 227, 228 (1st Dept 2006). "In considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion." *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997).

Here, it is unclear what caused the alleged short in the wiring at the premises. Plaintiffs submit an expert report which was drafted on January 20, 2008, by ChemTech, Inc. However, the report fails to identify whether the short was caused by a defect in the wiring, improper maintenance of the wiring, a result of a malfunction in the ACS, or due to an inadequate installation. It is also unclear from the report whether the repairs made by Rosenwach, two days prior to the subject incident, may have caused the flood. Although plaintiffs submit an exhibit which states that a rainstorm produced 7.57 inches of rain on April 15, 2007, plaintiffs' expert fails to discuss whether this amount of rain contributed to the flood. (Linton affirm., ex. A). Furthermore, defendants have failed to submit their own expert reports to dispute or supplement the findings of plaintiffs' expert.

The deposition testimony of the witnesses also conflicts regarding the alleged failure of the ACS and the cause of the short in the wiring. Richard Kroll, who worked at K & G for 44 years, testified that he received two training sessions from Gatesoft for the installation of the ACS units. (Kroll EBT, at 11-12). Kroll testified that a short in the wiring may have been caused by many factors including, the insulation of the wiring, the age of the building, the length of the wires, construction of the building, or due to someone hitting the walls. (Kroll EBT, at 33).

Gentile, president of Gatesoft, also testified as to what he believed may have caused the short. Gentile testified that water may have been the cause of the short and maintains that "[i]f water enters a conduit system it could have bends in it, and water that enters the top location, for

example, may have no exit." (Gentile EBT, at 144).

Along with the differences in opinions regarding the cause of the short, there also remains a question of fact as to whether the RH wiring, which was utilized by Rosenwach and K & G to install the ACS, was inadequate to support the machinery. At his April 22, 2012 deposition, Gentile testified:

Q. Now, does this system hook up into just any two wires?

A. Not any two.

Q. Okay, is there some sort of minimum requirements for these two wires?

A. They were designed to run on MTW or THHN. They are types of commonly found electrical wire in buildings.

(Gentile EBT, at 34-35).

While the testimony fails to identify RH wire as a sufficient wiring system for the ACS, an affidavit drafted by Gentile, which is dated August 16, 2012, states that "[t]he ACS was designed to be installed with a range for electrical wiring types commonly found in buildings in New York City which would include RH wiring as well as MTW and THHN." (Hottinger affirm., exhibit N). The affidavit, which plaintiffs note was served after the close of discovery and after plaintiffs served their motion for summary judgment, fails to address why Gentile now includes RH wire as a suitable wiring system for the connection of an ACS unit, and whether Gatesoft discussed the use of RH wiring with Rosenwach.

Kroll's testimony regarding the wiring of the ACS, also raises a question of fact as to whether THHN wire should have been utilized instead of RH. Kroll testified that there was not a particular type of wire which the system was designed to utilize. (Kroll EBT, at 16). However, Kroll testified that THHN insulation is less susceptible than RH to compromises from age or heat. Kroll states:

Q. Does THHN insulation generally-let me rephrase that. Can moisture lead to a short?

A. In RH, yes.

Q. But not THHN?

A. Not usually, it's gasoline and oil resistant.

(Kroll EBT, at 34-35).

Along with the dispute regarding whether RH was an adequate wire to be utilized with the ACS, there also exists a question of fact as to whether plaintiffs may have contributed to the incident. Kroll testified that the alleged failure of the ACS may have been caused by someone working at the premises. Following his review of a work ticket which was drafted regarding the incident, Kroll testified that the only way in which the tanks could have overflowed while the pumps were calling for water, would be if someone at the building manually turned off the pumps. (Kroll EBT, at 103-104). However, it is unclear from the record whether someone did or did not manually turn off the pumps before the incident.

Rosenwach argues that the lack of maintenance at the premises may have also contributed to the short. Rosenwach contends that there was no maintenance of the wiring in the building since 1987. Andrew Rosenwach (Mr. Rosenwach), manager and owner of Rosenwach, testified that if water came into contact with the existing wire, a short could have occurred. (Rosenwach EBT, at 148). Mr. Rosenwach also testified that:

[t]his roof is in awful condition. This roof is so porous in the picture - and I don't know when this picture was taken- that its just going to let water into the building, and I've never seen a roof in 37 years in an AAA building with moss growing on top of it.

(Rosenwach EBT, at 145).

Matthew M. Feeley (Feeley), building manager of the premises, testified that 48th

Americas was responsible for maintaining the wires inside the common areas of the building and that there was no procedure in place to regularly inspect the wiring. (Feeley EBT, at 26-28).

When asked at his deposition whether the electrical system between the tank and the basement pumps was previously repaired, Feeley testified that it was not maintained from 1985 through 2007. (Feeley EBT, at 29). Therefore, based upon the testimony of both Rosenwach and Feeley, it remains unclear whether the lack of maintenance at the premises may have been a contributing factor of the incident.

It also remains unclear as to what caused a sensor of the ACS, which measured the amount of water in the tank, to sustain damage and become removed from the tank. Gentile testified that he was advised by K & G that a water sensor, which was supposed to be located inside the tank, was found outside of the tank with hammer marks. (Gentile EBT, at 70-71). When questioned about the location of the sensor, Kroll testified that if the sensor was located outside of the tank, the ACS would read a level of "000" and this reading would activate the pumps. (Kroll EBT, at 49-51). It is unclear from the testimony of the witnesses, when and by whom the sensor was removed, whether the sensor became detached without human intervention, and whether its removal was a cause of the flooding.

Finally, plaintiffs alternatively argue that even if the cause of the flood is unknown, Rosenwach would be liable pursuant to the doctrine of *res ipsa loquitur*. The Appellate Division, First Department, has held that "[i]n order to submit a case to a trier of fact on the theory of *res ipsa loquitur*, a plaintiff must establish the event to be (1) of a kind that ordinarily does not occur in the absence of someone's negligence, (2) caused by an agency or instrumentality within the exclusive control of the defendant, and (3) not due to any voluntary action or contribution on the

part of the plaintiff.” *Crawford v City of New York*, 53 AD3d 462, 464 (1st Dept 2008).

Here, plaintiffs argument in support of res ipsa loquitor fails. Plaintiffs do not demonstrate that the cause of the incident was within the exclusive control of defendants. It remains unclear from the record whether defendants installation of the ACS caused the short, or whether other factors, such as the maintenance of the building by 48th Americas, may have caused the incident. Plaintiffs also fail to demonstrate that the incident was not due to their own voluntary or contributory actions. It is unclear whether the maintenance of the wiring and building contributed to the incident, if the tank was being operated manually, or if someone at the building removed the water sensor from the tank which could have led to the flooding.

Therefore, because plaintiffs and defendants fail to meet their burdens’ and do not demonstrate that no genuine issues of fact exist, the motions for summary judgment filed by Rosenwach, Afililiated, 48th Americas, K & G, and Gatesoft, are denied. *See Andre*, 35 NY2d at 364.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED that Rosenwach Tank Co., LLC’s motion for summary judgment is denied (motion sequence No. 001); and it is further

ORDERED that plaintiffs Affiliated FM Insurance Company, as subrogee and assignee of Kipp Stawski Management Corp. d/b/a Kipp Stawski Management Group and 48th Americas, and 48th Americas’ motion for summary judgment is denied (motion sequence No. 002); and it is further

ORDERED that K & G Electric Co., Inc.’s motion for summary judgment is denied

(motion sequence No. 003); and it is further

ORDERED that Gatesoft Technology, Inc.'s motion for summary judgment is denied

(motion sequence No. 004).

Dated: 4/8/13

ENTER: *[Signature]*
J.S.C.

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